

No. 83-1867

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In the Supreme Court of the United States

OCTOBER TERM, 1983

SUN TOWERS, INC., ET AL., PETITIONERS

v.

MARGARET M. HECKLER,
SECRETARY OF HEALTH AND HUMAN SERVICES

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT*

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Petitioners, a group of hospitals and their parent holding company, Hospital Corporation of America (HCA), contend that the Secretary of Health and Human Services acted arbitrarily and capriciously in disallowing Medicare reimbursement for costs incurred by HCA in connection with public trading of its stock.

1. The Medicare statute, 42 U.S.C. (& Supp. V) 1395 *et seq.*, provides for reimbursement to certain medical facilities of the "reasonable cost" of providing health care to elderly and disabled patients. 42 U.S.C. 1395f(b)(1). "Reasonable cost" is defined as "cost actually incurred, excluding therefrom any part of incurred cost found to be unnecessary in the efficient delivery of needed health services * * *." 42 U.S.C. 1395x(v)(1)(A). Both direct and indirect costs incurred in providing health care to Medicare patients are to be taken into account in determining Medicare reimbursement. 42 U.S.C. 1395x(v)(1)(A); 42 C.F.R. 405.451(b).

(1)

Congress has delegated to the Secretary the authority to promulgate regulations governing the determination of reasonable cost under the Medicare statute. 42 U.S.C. 1395x(v)(1)(A). Since 1973, the Medicare Provider Reimbursement Manual has stated expressly (at §§ 2134.9, 2150.2B.1) that stock maintenance costs are not reimbursable under Medicare. See Pet. App. 21 n.18, 115, 117-118.¹

2. In filing its Medicare cost report for 1973, each petitioning hospital sought reimbursement of a pro rata portion of approximately \$185,000 in stock maintenance costs incurred by HCA (Pet. App. 5, 81-82).² These costs included stock transfer and registration fees, expenditures for stockholders' meetings and reports, expenses in connection with mandatory filings with the Securities and Exchange Commission, and expenses of public relations directed at institutional investors (*id.* at 82). After their fiscal intermediaries denied these and certain other claims, petitioners filed a group appeal with the Provider Reimbursement Review Board (PRRB) (*id.* at 5). See 42 U.S.C. 1395oo(a) and (b). The PRRB held, *inter alia*, that the claim for stock maintenance costs should have been allowed (Pet. App. 80-96). The Deputy Administrator of the Health Care Financing Administration, acting on behalf of the Secretary, subsequently reversed the PRRB's decision with respect to stock maintenance costs, concluding that those costs were not allowable (*id.* at 60-79). See 42 U.S.C. (Supp. V) 1395oo(f)(1).

¹The Provider Reimbursement Manual, issued by the Secretary, interprets and supplements the Secretary's regulations published in the Code of Federal Regulations.

²Medicare providers may recover on a pro rata basis certain costs incurred by a "home office" such as HCA. Medicare Provider Reimbursement Manual, HIM-15, § 2150. See Pet. App. 115-118.

Petitioners sought judicial review in the United States District Court for the Western District of Texas. See 42 U.S.C. (Supp. V) 139500(f)(1). The district court held, *inter alia*, that the Medicare statute and regulations required reimbursement of stock maintenance costs (Pet. App. 53-55, 59).

The court of appeals reversed on the issue of stock maintenance costs (Pet. App. 20-28).³ The court agreed with the Secretary that stock maintenance costs are not "necessary" to the provision of medical services because they are a consequence of the parent company's election to organize as a publicly held corporation, and because medical care can be rendered by non-corporate entities that do not incur such costs (*id.* at 23). The court held that the Secretary acted reasonably in concluding that the primary purpose of stock maintenance costs is to protect investors, not to enhance the care of Medicare patients (*id.* at 23-25). The court rejected petitioners' contention that stock maintenance costs must be reimbursed because nonproprietary hospitals may obtain reimbursement of the costs of their annual meetings (*id.* at 24-25).

The court of appeals also held (Pet. App. 25) that, because stock maintenance costs are not costs of medical care, the disallowances in this case did not shift Medicare costs to non-Medicare patients in violation of 42 U.S.C. 1395x(v)(1)(A). The court determined (Pet. App. 25-26)

³The court of appeals affirmed the decision of the district court in all other respects. The court of appeals concluded that the Secretary's reversal of the PRRB decision was timely and that the Secretary had correctly disallowed petitioners' claims for reimbursement of an amount representing a return on equity capital invested in goodwill, costs in connection with unconsummated acquisitions, and an amount representing a return on equity capital invested in certain aircraft. Pet. App. 5-17, 28-41.

that recognition of stock maintenance costs under standardized accounting principles is not dispositive of the reimbursement issue. It rejected petitioners' claims that the Secretary's practice of reimbursing costs of employee fringe benefits and debt expense meant that stock maintenance costs must be reimbursed as well (*id.* at 26-28). The court concluded that the Secretary's disallowance of stock maintenance costs could not be said to be either irrational or inconsistent with the purpose of the Medicare statute (*id.* at 28).

3. Petitioners contend (Pet. 6-11) that review is warranted because there is a conflict among the circuits regarding reimbursement of stock maintenance costs under the Medicare program. The former Court of Claims held in *AMI-Chanco, Inc. v. United States*, 576 F.2d 320 (1978), that such costs are reimbursable. The Fifth Circuit in this case and the District of Columbia Circuit in *American Medical International, Inc. v. Secretary of Health, Education and Welfare*, 677 F.2d 118 (1981), have upheld the Secretary's decision that stock maintenance costs are not reimbursable.⁴

We believe that the conflict petitioners cite is of insufficient importance to warrant review by this Court. The Court of Claims is the only federal appellate court that has held that stock maintenance costs are reimbursable. The Claims Court and the Federal Circuit, successors to the Court of Claims, assert jurisdiction only of claims for cost years ending before June 30, 1973; other courts have jurisdiction of claims relating to more recent cost years. See 42 U.S.C. (& Supp. V) 1395oo(f); *Spokane Valley General*

⁴Several cases concerning Medicare reimbursement of stock maintenance costs are now pending in district courts in the Ninth and Eleventh Circuits, which have not yet decided the issue.

Hospital, Inc. v. United States, 688 F.2d 771, 775-776 (Ct. Cl. 1982).⁵ Thus, as to a given cost year, the availability of Medicare reimbursement of stock maintenance costs has not depended on which circuit decides a provider's claim. Moreover, only a few cases involving cost years ending before June 30, 1973, are still pending, so the conflict will have no effect on most cases now in litigation.⁶

(h) In any event, Congress recently amended the Medicare statute by completely revamping the manner of payment for most ~~H~~ospital services to covered individuals. Social Security Amendments of 1983, Pub. L. No. 98-21, Tit. VI, 97 Stat. 149-172. Under the amended statute, most hospital providers will be reimbursed on the basis of patients' diagnoses; the costs these providers actually incur will be irrelevant in computing reimbursement. The new prospective payment system will be phased in over the three years following October 1, 1983. See 49 Fed. Reg. 234, 235 (1984). To the extent that the treatment of stock maintenance costs may continue to be an issue, it will arise in a considerably different statutory and regulatory context. Accordingly, decisions like this one, which concern the treatment of stock

⁵Congress changed the procedure for appealing denials of reimbursement requests in 1974, effective for cost years ending on or after June 30, 1973. Pub. L. No. 93-484, 88 Stat. 1459. That amendment did not alter the substantive standards under which reimbursement claims were to be judged.

For cost years since 1973, the Court of Claims has asserted jurisdiction to review claims involving less than \$10,000. See *Appalachian Regional Hospitals, Inc. v. United States*, 576 F.2d 858, 864 (1978). However, to date stock maintenance claims have involved substantially larger amounts.

⁶Furthermore, the Court of Claims was the first appellate court to consider the treatment of stock maintenance costs. It is possible that the Federal Circuit would reconsider the holding of *AMI-Chanco* in light of the intervening decisions by the court below and the District of Columbia Circuit.

maintenance costs for past cost years, may have only limited significance for the future.

4. Review by this Court is not warranted for the additional reason that the decision below is correct. Congress delegated to the Secretary the authority to promulgate guidelines for determination of reasonable cost. See page 2, *supra*. The court of appeals correctly observed (Pet. App. 25) that as a practical matter the Secretary must have some discretion to draw lines in this area. As the court concluded, the Secretary's decision concerning stock maintenance costs, promulgated more than a decade ago, clearly has a rational basis; thus, it should be accorded deference. See, e.g., *Schweiker v. Gray Panthers*, 453 U.S. 34, 43-44 (1981); *Batterton v. Francis*, 432 U.S. 416, 425-426 (1977).

The Medicare statute and regulations provide only for reimbursement of those business expenses that are reasonable and necessary to the delivery of health care to Medicare patients. 42 U.S.C. 1395x(v)(1)(A); 42 C.F.R. 405.402, 405.451. As the court of appeals observed (Pet. App. 22-23), stock maintenance costs are incurred primarily for the benefit of investors, *i.e.*, the corporation's existing and prospective stockholders, rather than for the benefit of patients. Such costs are not incurred by non-corporate providers of medical services. These considerations alone constitute a rational basis for the Secretary's conclusion that stock maintenance costs are not essential to the efficient delivery of needed health services and thus do not fall within the category of costs that are reimbursable under Medicare.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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